IN THE HIGH COURT OF BOMBAY AT GOA

CIVIL REVISION APPLICATION NO.21/2002.

Smt. Gopiki Fondu Naik,
(deceased), represented
through legal heir:
1(a) Master Janu Naik,
through guardian
Narayan Naik, r/o
Mandur, Ilhas, Goa. ... Petitioner.

VERSUS

1. Shri Toru Hone Naik,
60 yrs. old, Agriculturist,
r/o Dhaklem Bhat, Dongri,
(deceased) represented
through legal heirs:

1(a) Shivanand Toru Naik,
son of late Toru Naik.

1(b) Prakash Toru Naik,
son of late Toru Naik.

1(c) Sunita Shivanand Naik,
daughter-in-law of
late Toru Naik.

1(d) Mali Prakash Naik,
daughter-in-law of
late Toru Naik.

2. Smt. Tulshi Naik,
widow of late Toru Naik,
all the above legal heirs
are residents of House
No.291, Madlo Wado,
Dhaklem Bhat, Dongri,
Ilhas, Goa. ... Respondents.

Shri Irshad Agha, Advocate for the Petitioners.

Shri M.B. D'Costa and Shri J.A. Lobo, Advocates for the Respondents.

CORAM: A.S. AGUIAR, J.

DATE: 7TH MARCH, 2002.

ORAL ORDER:

This revision application arises from the Order dated 14th June, 2001 of the Civil Judge, J.D., Panaji holding that the amended prayer of mandatory injunction directing the defendants to demolish the mewly constructed house is barred by limitation as the same has been sought for after a lapse of three years from the date the plaintiff (petitioner herein) acquired knowledge of the construction of the house. The impugned order came to be passed pursuant to the Order of this Court dated 10th March, 2000 in Civil Revision Application No.16/2000 directing the trial Court to frame preliminary issue on the question of limitation and to decide the same according to law. Civil Revision Application No.16/2000 was filed impugning the Order dated 15th October, 1999 whereby the trial Court rejected the defendants/respondents' application dated 29.4.99 praying that the following preliminary issue be framed and decided namely: " Whether the defendants prove that the direction for mandatory injunction for demolishing the house is barred by the law of limitation". The contention of the defendants in the said suit was that the matter was purely an issue of law and therefore the same could be disposed of as a preliminary issue. The application for framing the said issue as preliminary issue was made after the amendment

adding the prayer for mandatory injunction. The application for adding the amended prayer clause was made under Order 6, Rule 17 of C.P.C.

2. In the said application it was averred that it was necessary to incorporate new facts which have come into existence subsequent to the filing of the suit. The suit was filed on 1st February, 1982, praying for permanent injunction restraining the defendants, servants, agents, etc. from carrying on any new construction and also for a prayer of temporary injunction. It is averred in the plaint that the defendants had started a new permanent construction in the first week of January, 1982 on the ruins of temporary structure that collapsed during the last rainy season. Thus it is clear that some construction work had started prior to the filing of the suit.

3. Learned Advocate for the Respondents has pointed out that pursuant to Order dated 30th March, 1999 for furnishing better particulars passed by the High Court, the plaintiff admitted that the construction was completed in the year 1982. It is contended that the application for adding the prayer for mandatory injunction ought to have been filed within three years from the date of completion of the structure and that therefore the framing of the preliminary issue on

limitation and the findings thereon are justified.

4. Learned Advocate for the petitioners however contends that the amended prayer for mandatory injunction is not barred by limitation since the permission granted for addition of the prayer reverts back to the filing of the suit. In support thereof, he has referred to the decision in **Irfan Ahmad v. Nabil Ahmad Khan** (A.I.R. 1972 Allahabad, 15) where in para 6 the Court held: " As a general rule, the amendments relate back to the original date of the institution of the suit". Reference is made to the observation of the Supreme Court which has taken a liberal view of the scope of amendment of pleadings as contemplated by Order VI, Rule 17, C.P.C. in the case of Jai Jai Ram Manohar Lal v. National Building Material Supply, Gurgaon wherein it was observed: "The power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by any such narrow or technical limitations and since the name in which the action was instituted was merely a misdescription of the original plaintiff, no question of limitation arises; the plaint must be deemed on amendment to have been instituted in the name of the real plaintiff on the date on which it was originally instituted ....."

5. Learned Advocate Mr. Costa, on behalf of the

respondents, vehemently argued that the prayer for mandatory injunction is barred by limitation as the plaintiff has admitted that the construction was completed in the year 1982. The plaintiff therefore ought to have applied for amendment before the expiry of three years from the date of completion of the building in 1982. Reliance is placed on the decision in **T.L. Muddukrishana and another v. Smt. Lalitha Ramchandra Rao,** reported in A.I.R. 1997 S.C., 772 which reads as under:

> ".....it must be held that for the purpose of limitation what is material is that the limitation begins to run from the date the parties have stipulated for performance of the contract. The suit is required to be filed within three years from the date fixed by the parties under the contract. Since the application for amendment of the plaint came to be filed after the expiry of three years, certainly it changed the cause of action as required to be specified in the plaint. The suit for mandatory injunction is filed and the specific performance was sought for by way of an amendment. The cause of action is required to be stated initially in the plaint but it was not pleaded. It was sought to be amended along with an application for specific performance which, as stated earlier, was rejected. Under these circumstances, even by the date of filing of the application, namely, November 5, 1992, the suit was barred by limitation. The High Court, therefore, was right in refusing

> to permit the amendment of the plaint."

6. In the present case, it may be noted that the application which was for amendment by addition of the prayer for mandatory injunction has been allowed. The application for amendment could not be said to be barred by limitation as the facts which constitute the cause of action are incorporated in the pleadings. The plaintiff approached this Court after some construction work had started and therefore some construction was in existence. Failure to pray for mandatory injunction could be due to inadvertence or as a result of faulty drafting. The trial Court was therefore justified in allowing the application for amendment. The plaint as initially framed, clearly stated that some construction was in existence at the time of filing of the plaint. The main prayer ought to have been for mandatory injunction for demolishing whatever construction was carried out. No doubt the construction was completed in the year 1982 and the petitioner has been negligent in not moving the Court earlier for adding the prayer for mandatory injunction within that period. But the delay cannot be fatal, since the facts which constitute the cause of action are embedded in the pleadings and the prayer therefore for mandatory injunction can be implied. Hence the trial Court was right in allowing the amendment by adding the prayer for mandatory

injunction, albeit after the expiry of three years from the date of completion of the construction.

7. By deciding the preliminary issue holding that the relief of mandatory injunction was barred by limitation, the trial Court has in effect disposed of the suit. No doubt the trial Court has directed the suit to proceed in respect of other issues. But no other issues survive as the application for temporary injunction has also been rejected. It therefore has to be held that the failure to apply for amendment of the plaint by adding the prayer for mandatory injunction within the period of limitation, in view of the fact that there are averments in the plaint for granting such a prayer, cannot be fatal to the suit and the same cannot be said to be barred by limitation.

8. In view thereof, Civil Revision Application allowed. Impugned Order dated 14th June, 2001, is set aside. The trial Court is directed to decide and dispose of the suit on all issues on merits.

(A. S. AGUIAR)
JUDGE.

sl.